

Original

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

APR - 7 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 9 of the)
Communications Act) MD Docket No. 94-19
)
Assessment and Collection of Regulatory)
Fees for the 1994 Fiscal Year)

To: The Commission

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association, by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned proceeding.¹ NCTA is the principal trade association of the cable television industry in the United States. NCTA represents cable television operators serving over 80 percent of the nation's 56 million cable television households.

In its Notice of Proposed Rulemaking, the Commission seeks comments on its implementation of Section 6003(a) of the Budget Act of 1993² insofar as it authorizes the Commission to assess and collect user fees for regulated entities. NCTA's comments are limited to the Commission's proposals with respect to assessment of fees for cable television systems.

¹ Implementation of Section 9 of the Communications Act, MD Docket No. 94-19, released March 11, 1994.

² Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397 ("Budget Act").

No. of Copies rec'd
List A B C D E

079

A. The Commission's Proposal to Calculate Cable Fees Is Contrary to Its Statutory Mandate

The Budget Act mandates that the annual regulatory fee for a cable television system must be \$370 "per 1,000 subscribers." This provision is now incorporated in Section 9(g) of the Communications Act. Nevertheless, in the NPRM, the Commission proposes that cable operators with 1,000 or fewer subscribers will be assessed an annual regulatory fee of "\$370 per 1000 subscribers, or any portion thereof." (NPRM at ¶ 75, emphasis added). This method of calculating the fees to be paid -- in which a system with 10 subscribers pays the same as a system with a hundred times as many subscribers -- is plainly inconsistent with the statutory language and is contrary to the intent of Congress. The legislative history of this provision makes clear that Congress intended to have fees assessed on a per-subscriber, rather than a per 1000 subscriber (or any portion thereof), basis.

A review of the House Report accompanying the original regulatory fee proposal -- which, except for the level of fees themselves, was incorporated into the Conference Report accompanying the bill ultimately signed into law -- demonstrates the error in the proposed assessment. The House Report explains that in order to avoid substantial increases in rates for small systems, the fees (there proposed to be \$175 per 1,000 subscribers per year) should be paid on the basis of 17.5 cents per subscriber per year (i.e., 1/1000 of \$175). According to the House Report, "this will assure that small systems do not pay a disproportionate share of the amount collected by the Commission."³

This explanation of the workings of the proposed assessment was to guide the FCC in promulgating its implementing rules, as the Conference Report on the

³ H.Rep. No. 102-207, accompanying H.R. 1674, 102d Cong. 2nd Sess. (1991) at 23-24.

Budget Act made plain.⁴ The FCC's proposal, however, runs directly counter to this congressional intent. As Congress contemplated in the Budget Act, the Commission should require that cable operators pay 37 cents per subscriber based on the actual number of subscribers served.

B. The Commission Should Allow Operators to Aggregate Their Total Number of Subscribers in Determining Whether Installment Payments May be Made

The Budget Act provides that the Commission's regulations shall permit payment by installments for regulatory fees in "large amounts." The NPRM observes that the Act does not explain what constitutes "large" for these purposes, and proposes that for cable television systems, the cut-off should be based on whether an operator has fees in excess of \$18,500. NPRM at ¶ 77. However, the NPRM proposes to consider these payments on a system-only basis, and not to allow multiple system operators ("MSOs") to aggregate all of their subscribers in determining whether they meet the appropriate (\$18,500) threshold enabling them to pay in installments. Id. at ¶ 30.

The NPRM provides no explanation as to why a refusal to aggregate MSO subscribers for installment payment purposes is the preferred approach from the FCC's perspective. And, given that an operator electing to use the installment approach must pay the FCC's proposed additional installment payment processing charge,⁵ we can see no reason for this unduly burdensome requirement. Since there is no compelling reason to impose restraints on MSO voluntary installment payments, and because the Act does not compel the FCC's proposed approach, the Commission should permit (but not require) aggregation of fees of MSOs for

⁴ Report No. 103-213, accompanying H.R. 2264, 103d Cong., 1st Sess. (1993), at 499.

⁵ NPRM at ¶ 33.

purposes of determining eligibility for installment payments in order to ease administrative burdens on operators.

C. Annual Regulatory Fees Should Be Considered as External Cost For Cable Systems

.The Cable Act of 1992 requires the Commission, in establishing regulations governing rates for the basic tier, to take into account, among other things, "the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers."⁶ In establishing its rate regulation regime, the Commission adopted rules that treat governmental fees -- such as franchise fees imposed by local governments -- imposed directly on the provision of cable television service as "external costs" which can be passed through to subscribers. The Commission reasoned that external cost treatment was warranted for these fees and state and local taxes imposed directly on the provision of cable service because these costs are largely beyond the operator's control, and are "unique to cable operations."⁷

The FCC's annual regulatory fee meets all of the criteria for external cost treatment. It certainly is beyond the control of the operator; it clearly is government-imposed, just as is a tax or a franchise fee; and it is a cost "unique to cable operations". See Rate Order at ¶ 254. Moreover, the federal cable regulatory fees, like the state or local franchise fee for which external treatment is given, were

⁶ 47 U.S.C. § 623(b)(2)(C)(v).

⁷ Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 (1993) at ¶ 254.

not reflected in the September 30, 1992 rates charged by cable operators from which the benchmark formula is derived. Failure to accord external treatment to these newly-imposed fees would therefore unfairly require cable operators to absorb new governmentally-imposed costs for which recovery in FCC mandated rates would be impossible.

For these reasons, the Commission should clarify that the entire amount of the regulatory fees, and any subsequent increases in them, should be considered an external cost which cable operators may pass through to subscribers.

CONCLUSION

For the reasons stated above, the Commission should (1) require cable operators to pay their annual regulatory fees (for their systems) on the basis of 37 cents per subscriber; (2) permit aggregation of fees among systems held by MSOs for the purposes of determining eligibility for installment payments; and (3) accord external cost treatment to the cable regulatory fees.

Respectfully submitted,

NATIONAL CABLE TELEVISION
ASSOCIATION, INC.

By Daniel L. Brenner/dlb
Daniel L. Brenner
Neal M. Goldberg
Diane B. Burstein

ITS ATTORNEYS
1724 Massachusetts Avenue, NW
Washington, DC 20036
(202) 775-3664

April 7, 1994